

## > Client Alert

### EEOC Guidance for Employers on Requiring Employees to Receive COVID-19 Vaccinations or Implementing Their Own Programs for Vaccinating Employees

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Since the government announced that a COVID-19 vaccine would be available to the general public, employers have been eager to know whether, when the vaccines become more universally available, they can require their employees to receive the COVID-19 vaccine as a condition of returning to the workplace. On December 16, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) released guidance in an effort to provide clarity on this question and setting forth the steps that businesses looking to initiate mandatory vaccination programs must take before prohibiting unvaccinated employees from entering the workplace.

The guidance was set forth in the EEOC's technical assistance questions and answers page, entitled "[What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)" (the "EEOC Guidance"). In Section K (entitled "Vaccinations") of the EEOC Guidance, the EEOC explains how employers may adopt a vaccine requirement within the legal parameters of the Americans with Disabilities Act (ADA), Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act, including the Pregnancy Discrimination Act (PDA).

More specifically, the EEOC Guidance provides that, once a COVID-19 vaccine is widely available, employers may legally require that their employees be vaccinated as a condition of returning to the workplace. However, employers must first attempt to reasonably accommodate employees who, due to medical disabilities or sincerely-held religious beliefs, decline or refuse to receive the vaccine. In other words, an employer cannot simply compel employees to be vaccinated before returning to the workplace, and, instead, must engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship on the employer's business. Also, if the employer itself intends to administer the COVID-19 vaccination, there are other questions and considerations employers must address and be mindful of, as discussed below.

Among those questions to which there is a clear response in the guidance is:

**Is the administration of a COVID-19 vaccination to an employee by an employer (or by an employer's contracted third-party) considered a "medical examination" for purposes of the ADA?**

The answer is: No. The vaccination itself is not a medical examination, but the EEOC Guidance states that any pre-screening vaccination questions asked by the employer or contracted third-party may implicate the ADA's provision on disability-related inquiries. Thus, if the employer administers the vaccine (or hires a third-party contractor to do so), it must show that such pre-screening questions, which are typically required when the COVID-19 vaccination is administered, are "job-related and consistent with business necessity." This is essentially a heightened standard that employers must meet if they choose to administer the COVID-19 vaccination to employees (as opposed to employees receiving the COVID-19 vaccine from their healthcare providers).

The ADA also requires employers to keep any employee medical information obtained in the course of a COVID-19 vaccination program confidential.

### **How should an employer respond to an employee who indicates that they are unable to receive a COVID-19 vaccination because of a disability?**

When disability-related issues prevent a worker from adhering to an employer's mandatory vaccination program, the employer must determine whether the unvaccinated employee poses a "direct threat" to workplace health and safety.<sup>1</sup> In order to determine whether a direct threat exists, the employer is required to conduct an individualized assessment of four factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to possible infection of the virus at the worksite. If the employer does determine a direct threat exists due to the presence of the unvaccinated employee, it must then determine if it can provide a reasonable accommodation (absent an undue hardship to the employer<sup>2</sup>) to eliminate or reduce that risk such that the employee does not pose a direct threat. Only where the employer determines, based on objective evidence, that the presence of an unvaccinated employee poses a direct threat to the health and safety of others in the workplace, and that the threat cannot be reduced to an acceptable level by a reasonable accommodation (again, absent an undue hardship to the employer) may the employer exclude the employee from physically being in the workplace.

This does not mean, however, that the employer may automatically terminate the employee. Employers must still determine whether any other rights apply under relevant federal, state, and local anti-discrimination laws. For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a mandatory vaccination program, the employee may be entitled to accommodations such as being allowed to work remotely. This is the same step that employers take when physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms; some workers, for example, may be entitled to telework or, if not, may be eligible to take leave under the Families First Coronavirus Response Act, under the FMLA, or under the employer's policies.

All of the foregoing emphasizes the importance of managers' and supervisors' responsibility for communicating with employees about compliance with the employer's mandatory vaccination program and the requirement that they know how to respond to an accommodation request from an employee with a disability. Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship (*i.e.*, "significant difficulty or expense"). This interactive process should include determining whether it is necessary to obtain supporting documentation about the employee's disability and considering the possible options for accommodation given the nature of the workforce, of the employer's

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<sup>1</sup> The EEOC Guidance explains that the "direct threat" requirement requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." EEOC Guidance at K.5. (citing 29 C.F.R. section 1630.2(r) (regulation addressing direct threat to health or safety of self or others)).

<sup>2</sup> An undue hardship is a "significant difficulty or expense" to the employer. EEOC Guidance at D. The guidance notes that "[w]here a requested accommodation would result in undue hardship, the employer must offer an alternative accommodation if one is available absent undue hardship." *Id.*

operations and the employee's position. The EEOC has advised that the prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration.

**By the new Guidance, the EEOC also warns employers that it is unlawful to disclose that an employee is receiving a reasonable accommodation or to retaliate against an employee for requesting such an accommodation.**

#### **How should an employer respond to an employee who indicates that they are unable to receive a COVID-19 vaccination because of a sincerely held religious belief, practice, or observance?**

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act. Courts have defined "undue hardship" under [Title VII](#) as having more than a *de minimis* cost or burden on the employer. The EEOC Guidance explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.

If an employee cannot get vaccinated for COVID-19 because of a sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible to provide at the workplace, then it would be lawful for the employer to exclude the employee from the workplace. Again, however, this does not mean the employer may automatically terminate the employee for this reason. As discussed above for employees with disabilities, in dealing with an employee's refusal to receive a vaccination for sincerely held religious belief, practice or observance, employers will again need to determine if any other rights apply under federal, state, and local anti-discrimination laws, such as allowing an employee to telework as a reasonable accommodation.

**In its analysis and Guidance, the EEOC again reminds employers that it is unlawful for an employer to retaliate against an employee for requesting an accommodation due to their sincerely held religious belief, practice, or observance.**

#### **Next steps**

While employers can certainly initiate a mandatory COVID-19 vaccination program, perhaps an alternate solution based on the EEOC Guidance for employers, would be to encourage employees to be vaccinated, rather than making it mandatory especially given the resources that will likely have to be expended in order to engage in an interactive (or in New York City, cooperative) dialogue to ascertain reasonable accommodations for those employees who cannot receive the COVID-19 vaccination due to a disability or sincerely held religious belief, practice, or observance.

Separately, there are wage and hour concerns to be considered by employers, as, for example, non-exempt (hourly) employees should be paid for the time it takes them to get a mandatory COVID-19 vaccination, and employers in certain states are required to reimburse employees for out-of-pocket costs relating to obtaining a mandatory COVID-19 vaccination as well. Finally, state and local laws may impose their own requirements regarding mandatory COVID-19 vaccinations that employers must adhere to.

The Morrison Cohen LLP Labor & Employment Team is available to provide legal advice in connection with those employers considering the initiation of a mandatory COVID-19 vaccination programs or such other employment law issues that may arise in connection therewith.